No. 96-1395

In The

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.,

Respondents.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

HARRY R. MCMANUS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENT LESTER E. ERICKSON'S BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

ARE DUE PROCESS RIGHTS OF FEDERAL EMPLOYEES VIOLATED BY CHARGING THEM WITH FALSIFICATION BASED ON THEIR DENIAL OF ALLEGED MISCONDUCT?

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RESPONDENT LESTER E. ERICKSON'S BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent Lester E. Erickson respectfully submits his response in opposition to Petitioner's Petition for a Writ of Certiorari.

OPINIONS BELOW

While Petitioner has correctly cited the salient opinions in this matter, it has omitted one denial of reconsideration, specifically: *Erickson v. Department of the Treasury and Office of Personnel Management*, Docket Number DA-0752-93-0295-R-1, *Order* (denying reconsideration) (Merit Systems Protection Board 3/24/95).

STATEMENT OF THE CASE

Lester Erickson, a Police Sergeant with the Bureau of Engraving and Printing, appealed his termination to the Merit Systems Protection Board on March 22, 1993. His notice of proposed removal contained two charges. Charge 1 was captioned: "Making False Statements in Matters of Official Interest" and concerned Mr. Erickson's response to an investigation on October 30, 1992.[1] Specifically, the agency was investigating the source of telephone calls to employees in which the caller would,

[1] Respondent Erickson's Appendix, 1a-2a.

without identifying himself, laugh madly into the telephone and hang up.[2]

The Agency distributed written questionnaires among members of the police unit, including Mr. Erickson.[3] To the question, "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?" Mr. Erickson responded, "None." To the question, "Approximate time you quit participating in 'Mad Laugher' calls," Mr. Erickson responded, "I never participated." To the question, "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?" Mr. Erickson responded, "None, because I do not know who is doing it." Finally, to the question, "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls?" Mr. Erickson's response was, "No – I do not know the true identification of the 'Mad Laugher.' In my opinion it is 95% of the police unit (and) also possibly personnel in Production."[4]

Page 14 of Petitioner's *Petition* argues that this last statement was more than a mere denial and was an affirmative misstatement. In fact, many employees were

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[2] Respondent Erickson's Appendix, 3a-6a.

[3] Respondent Erickson's Appendix, 3a-6a.

[4] Petitioner's Appendix, 52a-53a.

found to have participated in the "Mad Laugher" incidents.[5] Respondent Erickson has included the Merit System Protection Board's *Initial Decision* to correct Petitioner's misstatement of fact.[6]

Based on the responses submitted by other members of the police unit, Mr. Erickson's superior, Carol Williamson, concluded that he had participated in the "Mad Laugher" caper and that his statements quoted above were false. She further concluded that his conduct violated Section 0.735-55 of the Department's Minimum Standards of Conduct. Such standards prohibit employees from uttering or writing false, misleading or ambiguous statements, deliberately or willfully, in connection with an official matter.[7]

In Charge 2, captioned, "Conduct Unbecoming a Supervisor," Mr. Erickson allegedly urged a co-employee to make a "Mad Laugher" call. Although the employee had not made the call, Mr. Erickson's conduct was found inappropriate and unacceptable.[8]

After the Administrative Law Judge upheld Mr. Erickson's removal, Mr. Erickson appealed to the Board. The Board denied his petition for review, but reopened the case on its own motion.[9]

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[5] Respondent Erickson's Appendix, 4a-6a, 8a.

[6] Rules of the Supreme Court of the United States, Rule 15(2).

[7] Respondent Lester Erickson's Appendix, 3a.

[8] Respondent Lester Erickson's Appendix, 6a, 8a-9a.

[9] *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); Petitioner's Appendix, 50a.

The Board began its review with the proposition, stated in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-1575 (Fed. Cir. 1988), that an agency may not charge an employee with falsely denying misconduct when it separately charges him with the misconduct. Charge 1 was not sustained because its essence consisted of Mr. Erickson's failure to admit his participation in the conduct under investigation.[10]

The Board further found, however, that Mr. Erickson was never actually charged with the underlying conduct. Charge 1 was concerned with the veracity of his statements while Charge 2 dealt with his prompt to another employee to initiate a "Mad Laugher" call. Neither charge gave Mr. Erickson notice that he was charged with "Mad Laugher" calls. Consequently, the Board disregarded the agency's allegation that Mr. Erickson made the calls. The *Initial Decision*, sustaining Charge 1, was therefore reversed.[11]

The Board sustained Charge 2, but mitigated the penalty to a fifteen day suspension.[12]

Following the Merit System Protection Board's denial of reconsideration,[13] the Office of Personnel Management appealed to the Federal Circuit Court of Appeals. Several cases in which the Merit Systems Protection Board

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[10] Petitioner's Appendix, 52a-53a.

[11] Petitioner's Appendix, 53a-54a.

[12] Petitioner's Appendix, 54a-55a.

[13] *Erickson v. Department of the Treasury and Office of Personnel Management*, Docket Number DA-0752-93-0295-R-1, *Order* (Merit Systems Protection Board 3/24/95).

resolved the same issue in favor of the employee were then consolidated for purposes of the appeal. The Federal Circuit, in *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996),[14] affirmed the Merit System Protection Board's decisions. Following denial of its petition for a hearing and suggestion for a rehearing *en banc*,[15] the Office of Personnel Management petitioned this Court for a writ of certiorari.

ARGUMENT

The considerations this Court applies in reviewing a petition for certiorari are as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari is granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[16]

Recognizing that the Court has unlimited discretion in choosing to grant petitions for certiorari, Respondent

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[14] Petitioner's Appendix, 1a-23a.

[15] Petitioner's Appendix, 108a-109a.

[16] Rules of the Supreme Court of the United States, Rule 10.

Erickson nevertheless contends there are no compelling reasons to grant Petitioner's petition, there is no question of federal law so important as to warrant Supreme Court scrutiny and the *King v. Erickson, supra* decision does not conflict with any decisions of this Court.

Petitioner has overlooked the precedential background behind *King v. Erickson* that appears in *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). *Grubka* involved four charges of employee misconduct, three for sexual harassment and one for prevarication. The Federal Circuit dismissed the first two charges because they were frivolous and there was no substantial evidence to support them. The Court dismissed the third charge because the administrative judge erroneously decided credibility and the incident was a private matter, unrelated to the official business concerns of the agency.

After reciting the fourth charge, alleging that Mr. Grubka made a false statement in a matter of official interest, the Court stated as follows:

> The AJ sustained this charge and in doing so found Grubka guilty of making a false statement in a matter of official interest in denying that he kissed Novak in the hotel stairwell by proving by Novak that he did kiss her. In other words, the AJ held by circuitous reasoning that proof by Novak that Grubka kissed her ipso facto proved that his denial was false and therefore, his denial was a separate offense as charged. We do not agree. This was indeed a novel theory. The effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true. We have found no case, and no case has

> been cited to us that approves such a theory. It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the AJ denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law . . . We hold that the charge has no substance, is frivolous and the decision of the AJ sustaining it is not supported by substantial evidence and is erroneous as a matter of law.[17]

The United States did not seek certiorari in *Grubka*.

King v. Erickson, supra did not deviate from the principle enunciated in *Grubka*, nor did it expand it. The *Erickson* decision begins with an analysis of the federal employment context. Cause is required for discharge of federal employees.[18] Specific due process procedures, before the imposition of adverse action, include thirty days' written notice of the reasons for the proposed action, a response time of seven days and a written decision accompanied by specific reasons for the action taken.[19] By virtue of 5 U.S.C. § 7513, federal employees possess a property right in their employment within the meaning of the Fifth Amendment to the United States

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[17] *Grubka, supra*, at pgs. 1574-1575.

[18] *Id.*, at p. 1581; 5 U.S.C. § 7513(a).

[19] *Id.*, at p. 1581; 5 U.S.C. § 7513(b).

Constitution. *Id.*, at p. 1580. This right entitles federal employees to minimum due process procedures, which, pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) consist of notice and a meaningful opportunity to respond. The issue posed by *Erickson* and the companion cases is whether due process is threatened by charging employees with falsification after they deny incidents of misconduct. The Federal Circuit answered this question affirmatively, because in its view, a threatened falsification charge impedes an employee's meaningful opportunity to respond.[20]

The Office of Personnel Management argued that while federal employees could deny a charge, denial of the underlying facts permissibly formed the basis of a falsification charge. The Federal Circuit rejected this distinction. Under OPM's view, federal employees, unsophisticated in legal technicalities, must distinguish between legal statements of misconduct and the facts that underlie them. Fearing their denials would subject them to an additional falsification charge, employees would be reluctant to deny charges.[21]

The Federal Circuit correctly observed that in each case before it, the addition of the falsification charges had augmented the penalties to either removal or demotion. Federal employees, aware of the risk of a falsification charge, would feel coerced into admitting misconduct.

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[20] *King v. Erickson, supra*, at p. 1581.

[21] *King v. Erickson, supra*, at p. 1583.

The circumstance of faulty memories or divergent perceptions would too readily transform credibility determinations into falsification charges. The consequent "chilling effect" on federal employees' right to respond would not comport with their due process rights.[22] While it is naturally easier for an agency to prove misconduct with the leverage of a threatened falsification charge, due process requires allowing an employee to deny both the charge and its underlying facts without risk of the falsification charge.[23] The Federal Circuit cautioned that a right of denial does not equate to a right to lie or affirmatively mislead an agency. Beyond denial of the specific facts forming the charge, the employee had no right to invent stories, or tamper with evidence. Engaging in such conduct provides the basis for a falsification charge.[24]

The Office of Personnel Management argued that the Fifth Amendment right against compulsory self-incrimination did not require a right of denial. The Federal Circuit responded that the right against self-incrimination had nothing to do with the procedural due process concerns arising out of *Grubka, supra*.[25]

Finally, the Office of Personnel Management argued that the Merit Systems Protection Board's decisions ran afoul of *United States v. Dunnigan*, 507 U.S. 87 (1993). In particular, OPM was referring to the decision in *Walsh v.*

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[22] *Id.*, at p. 1583.

[23] *Id.*, at p. 1584.

[24] *King v. Erickson, supra*, at pgs. 1583-1584.

[25] *Id.*, at p. 1584.

Department of Veterans Affairs, 62 M.S.P.R. 586 (1994),[26] where the Board had declined to consider Ms. Walsh's denial of misconduct as justification for an enhanced penalty. The Board relied on *Walsh, supra* in deciding *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994).[27]

Dunnigan, supra involved the constitutionality of a statute that enhanced a criminal sentence for a defendant's perjury at trial. This Court, in finding that the statute was not unconstitutional, held that a right to testify does not include a right to lie.[28] The *Erickson* Court concurred with this proposition. Similarly, it stated, federal employees have no right to lie or mislead. They simply have a right to deny the facts supporting the charges against them, and also the charges themselves. If charging an employee with falsification based upon his denial of misconduct is improper, then there is no justification to consider the denial for penalty enhancement purposes.[29]

Applying its holding to Mr. Erickson's facts, the Court found his denials of knowledge of or participation in the "Mad Laugher" pranks made up the basis of the falsification charges. His statements were not otherwise false. Consequently, the Merit Systems Protection Board

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[26] Petitioner's Appendix, 41a-42a.

[27] Petitioner's Appendix, 55a.

[28] *Id.*, 507 U.S. at p. 96.

[29] *King v. Erickson, supra*, at pgs. 1584-1585.

had not erred in reversing the falsification charge against him.[30]

Petitioner's basic assumption in urging this petition is that the *Erickson* decision creates and sanctions a right to lie among federal employees. It says that the Federal Circuit's condemnation of affirmative misstatements is undermined by the alleged affirmative misstatements made in these cases. In particular, it cites Mr. Erickson's statement that "in my opinion it is 95% of the police unit [and] also possibly personnel in Production" who made the calls. As Respondent Erickson has shown above,[31] other employees participated in the "Mad Laugher" calls. Further, Mr. Erickson was not charged with falsification based on that statement alone but on all his denials of participation in the prank.[32] Contrary to Petitioner's argument, the facts in Mr. Erickson's case do not sanction a right to mislead.

Petitioner argues that the line between affirmative misstatements and denial is inherently unstable. Given the broad range of employment scenarios that occur, as shown by these cases alone, Petitioner may be correct. The question, however, is whether that circumstance corrupts the basic principle *King v. Erickson* seeks to protect, specifically, the employee's right to a meaningful response. Simply because an employing agency has to sift through statements and decide which ones are true

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[30] *King v. Erickson, supra*, at p. 1585.

[31] Respondent Erickson's Appendix, 4a-6a, 8a.

[32] *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); Petitioner's Appendix, 52a-54a.

denials and which are affirmative misstatements does not justify the automatic addition of a falsification charge. As *Erickson* correctly observes, the employee has a property interest at stake that is entitled to constitutional protection.[33] Allowing an agency to threaten an employee with a falsification charge turns his due process entitlement into a sham.

Respondent agrees with Petitioner's assertion that there is no constitutional right to lie. None of the criminal cases it cites, however, are instructive on the issue of whether charging a federal employee with falsification based on his denial of facts is constitutional. In *Bryson v. United States*, 396 U.S. 64 (1969), the defendant appealed his conviction for filing a false affidavit in which he had denied communist party affiliation. The affidavit was compelled by a statute later declared unconstitutional. In upholding his conviction, this Court held that the unconstitutionality of the statute did not alter the fact that the defendant had lied.

In *Glickstein v. United States*, 222 U.S. 139 (1911), the issue was whether immunity from criminal prosecution in a bankruptcy statute protected the defendant's perjury at a creditors' hearing. The Court concluded Congress had not intended, within that statute, to give debtors a license to commit perjury during bankruptcy proceedings. In *United States v. Knox*, 396 U.S. 77 (1969), this Court considered the sufficiency of an indictment charging the defendant with falsifying information on a wager registration form. The defendant argued that completion

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[33] *King v. Erickson, supra*, at pgs. 1580-1581.

of the form truthfully would incriminate him under existing state statutes. This Court held that the indictment was sufficient. Whether completion of the form was defensible on duress or compulsion grounds were factual questions for trial.

In *United States v. Apfelbaum*, 445 U.S. 115 (1980), the defendant was given immunity before testifying before a grand jury. He nevertheless committed perjury. This Court considered whether his truthful statements, given under the grant of immunity, and his false statements, were admissible as evidence during the perjury trial. Because the Court held that the Fifth Amendment, as it relates to self-incrimination, provides no protection for perjury, the entirety of his statements was admissible.

Finally, in *United States v. Havens*, 446 U.S. 620 (1980), this Court considered whether evidence suppressed because of an illegal search was usable for impeachment of defendant's testimony on cross-examination. While the defendant had a constitutional shield from evidence gathered improperly, that protection did not entitle him to commit perjury and the evidence was admissible once he did so.

All these cases resolve criminal issues involving self-incrimination and none address the due process concerns raised here. This case does not rest on the Fifth Amendment protection against self-incrimination. Rather, it reaffirms the opportunity to be heard protected by the due process clause of the Fifth Amendment. The cases cited by Petitioner in this regard are inapposite and the Federal Circuit correctly disregarded them in reaching its decision.

Finally, Petitioner again argues the application of *United States v. Dunnigan, supra*. *Dunnigan* addressed whether enhancement of a criminal sentence, resulting from defendant's perjury at trial, was proper. The statutory framework, including perjury as a penalty enhancement factor, does not exist here. *Dunnigan* did not create a right to enhance sentencing because of perjury; it merely said that Congress, when enacting the legislation, did not trample on a defendant's constitutional right to give testimony.

Respondent submits that the issue is not whether there is a constitutional right to lie, but whether *King v. Erickson* created or sanctioned such a right. Creation of such a right did not occur in *Erickson* and Petitioner has not cited any case approving or sanctioning such a right.

Petitioner claims that the rule enunciated in *Erickson* is "unprecedented." To the contrary, the rule first appeared in *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988) and has been the law of that circuit for nearly a decade. (See *Beverly v. United States Postal Service*, 907 F.2d 136 (Fed. Cir. 1990) holding the administrative judge correctly decided that a second charge was a mere denial of the first charge and was not a valid separate offense.)

Since Petitioner cannot show how the government's abilities to manage the civil service were adversely affected in the past nine years, there are no compelling reasons to grant this petition. *Erickson* does not conflict with any decisions of this Court and the Federal Circuit's decision does not establish any new principle requiring review by this Court.

CONCLUSION

While this Court has unlimited discretion in deciding to grant a petition for writ of certiorari, Petitioner's petition does not meet this Court's rules for granting a writ. Petitioner argues that the *Erickson* decision has both created and sanctioned a "right to lie" among federal employees. The decision, however, scrupulously distinguished a "right to lie" from the right to deny misconduct. It impairs a federal employee's constitutional right to a meaningful response if such distinction is not recognized. The rule prohibiting a falsification charge, when a federal employee denies misconduct, has been the law of federal employment for nearly a decade. Petitioner fails to show how such rule has adversely affected management of the civil service.

In support of its argument that *Erickson* conflicts with this Court's decisions, Petitioner cites several criminal cases where a defendant was convicted of perjury or received an augmented sentence because of perjury. Respondent Erickson submits that the narrow issues in those cases are not applicable here. There is no conflict between *Erickson* and any of the decisions Petitioner has cited.

Petitioner argues that because the line between denial and affirmative misstatement is indefinite, the rule enunciated in *Grubka* and *Erickson* should be reversed. The difficulty an employing agency may encounter in separating denials from affirmative misstatements does not justify chilling an employee's right to respond by a threatened charge of falsification.

Accordingly, Respondent Erickson requests that this Court deny Petitioner's *Petition for a Writ of Certiorari*.

Respectfully submitted this 5th day of June, 1997.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

LESTER E. ERICKSON, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER DA-0752-93-0295-I-1 DATE: July 21, 1993

Lester E. Erickson, Walkertown, North Carolina, pro se.

Arlean Leland, Esquire, Washington, D.C., for the agency.

BEFORE

Sharon Fonsworth Jackson
Administrative Judge

INITIAL DECISION

Lester E. Erickson filed an appeal on March 22, 1993, from an action taken by the Department of the Treasury which removed him from his position of Supervisory Police Officer with the Bureau of Printing and Engraving (BEP), effective March 20, 1993. The Board has jurisdiction over the appeal pursuant to the provisions of 5 U.S.C. §§ 7511-7513.

Based on the following analysis and findings, the agency's action is AFFIRMED.[1]

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[1] A hearing was originally scheduled on this appeal on May 26, 1993. *See* Appeal File, Vol. I, Tab 7. It was continued to June 10, 1993, at the agency's request. Prior to the scheduled

ANALYSIS AND FINDINGS

The agency based its decision to remove the appellant from his position on charges of (1) making false statements in matters of official interest, and (2) conduct unbecoming a supervisor. *See* Appeal File, Vol. I, Tab 8(41). The removal action will be sustained by the Board only if it is supported by a preponderance of the evidence. *See* 5 U.S.C. § 7701(c). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. C.F.R. § 1201.56(c)(2)(1993).

The appellant made false statements in matters of official interest.

According to the notice of proposed removal, the appellant submitted a false statement to the agency on October 30, 1992, in connection with an official investigation of a complaint filed by Officer Hilton Moore. In an

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hearing, the parties' representatives advised me that a settlement agreement had been reached and the hearing was cancelled. The appellant's representative subsequently advised me that the appellant had refused the agency's settlement offer and that he was withdrawing as the appellant's representative. *See* Appeal File, Vol. II, Tab 17. I ordered the appellant to advise me by June 24, 1993, whether he wanted to proceed with a hearing. I also advised the appellant that absent my receipt of his response by June 24, 1993, he would be deemed to have waived his hearing request and the appeal would be decided on the record. *Id.* In addition, I scheduled a conference call with the parties and set a close of record date. The appellant did not file a timely response to the order; therefore, the appeal is being decided on the basis of the parties' written submissions.

interview during that investigation, the appellant was asked specifically about his knowledge and/or participation in the "Mad Laugher" telephone calls.[2] *See* Appeal File Vol. I, Tab 8(41). The appellant provided a sworn statement in which he denied any knowledge of the "Mad Laugher," with the exception of a softball team by that name. He also stated, however, his belief that "95% of the Police Force Unit" had participated in the "Mad Laugher" telephone calls. *Id.* The agency asserted that sworn statements obtained from Officers Craig D. Straight and Erick Williams, Sergeant Danny W. Seyler, and Carol R. Wimpey, a BEP Contractor, substantiated that the appellant had knowledge of, and participated in, the "Mad Laugher" telephone calls. The agency contended that the appellant's failure to admit his knowledge of and participation in the "Mad Laugher" telephone calls during the investigation violated Section 0.735-5 of the agency's Minimum Standards of Conduct.[3]

In order to support its charge, the agency must establish that the appellant provided false information with the intention or [sic] defrauding or deceiving the agency.

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[2] The record reflects that the "Mad Laugher" telephone calls refer to numerous telephone calls made to agency employees at their duty stations, during which the caller would engage in continuous laughter without giving his/her identification. *See* Appeal File, Tabs 8(4z), 8(4aa).

[3] The agency submitted a copy of Section 0.735-5 of the agency's Minimum Standards of Conduct. *See* Appeal File, Vol. I, Tab 8(4cc). That section prohibits agency employees from making false, misleading, or ambiguous statements, deliberately or willfully, whether oral or written, in connection with any official matter.

See Naekel v. Department of Transportation, 782 F.2d 975, 977 (Fed. Cir. 1986). In establishing an employee's intention to deceive or mislead the agency, circumstantial evidence may be considered. *Kumferman v. Department of the Navy*, 785 F.2d 285, 290 (Fed. Cir. 1986).

The agency provided a copy of the appellant's handwritten sworn statement dated October 30, 1992, in which the appellant answered specific written questions posed to him by Carol Williamson, Manager of the Security and Police Services Branch.[4] *See* Appeal file, Vol. I, Tab 8(4x). In his statement, the appellant responded to Williamson's written questions by indicating that his knowledge of the "Mad Laugher" was that it was the name of a softball team; that he had never made or participated in any "Mad Laugher" calls; that he had received several such calls himself; and that he did not know who was making the calls. The appellant stated he believed that 95% of the police unit and "possibly personnel in Production" were involved. *Id.* The appellant said that he had heard the lieutenant ask at least three times for the calls to cease; however, he had never asked his subordinates to cease the calls because he did not know who was making them. The appellant asserted that the "whole charade" was ridiculous and a waste of taxpayers' money. He further asserted his belief that the investigation stemmed from a plot to discredit him that had been orchestrated by Lieutenant Stout and Sergeant Seyler.

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[4] Williamson also served as the investigator of Hilton's complaint concerning the "Mad Laugher" telephone calls.

The appellant's statement was written on a preprinted agency form entitled "Voluntary Statement," *Id.* The appellant, however, wrote on the form that he was giving it under duress and fear of losing his job. In a separate handwritten statement, also dated October 30, 1992, the appellant indicated that he had been ordered by Williamson to give the statements and was doing so "at her order as a condition of employment in view of possible job forfeiture." The appellant then complained specifically about his relationship with Stout and Seyler, and contended that the working conditions at the BEP were unbearable and discriminatory. The appellant asked that an investigation of his allegations be conducted.

The agency also provided sworn statements from Straight, Williams, Seyler, and Wimpey. *See* Appeal File, Vol. I, Tabs 8(4s), 8(4y), 8(4z), and 8(4aa). According to Straight's statement, he began receiving "Mad Laugher" calls shortly after he went on eight-hour evening shifts. He initially received the calls while he was on Posts 5 and 8, but then he began receiving them "all over the place," including the arms room where he picked up his weapon and radio, and the locker room. He deduced that the calls were being placed from the Command Center. He thought the calls were part of an "initiation because all of the officer's [sic] that have been at BEP long before [him] . . . were involved with it." Appeal File, Vol. I, Tabs 8(4aa). Straight stated:

> Once it became apparent that the Mad Laugher calls didn't bother me the calls became less frequent. Officer Midder would come around and ask me "have you recieved [sic] a call from the Mad Laugher yet". I have worked the front gate

> and recieved [sic] Mad Laugher calls and called the number printed on the telephone read-out window and Officer Midder would answer. Sgt. Erickson would come around during post inspections and would say "Be on the look out the Mad Laugher is out and about". [Spelling and punctuation as in original.]

Id.

Straight stated that when he subsequently learned, after talking to Stout, that the "Mad Laugher" calls were no longer a joke, he stopped participating in the calls. He said that Stout, who had received two "Mad Laugher" calls during roll call, had told everyone to "knock it off." Straight described subsequent pranks Midder and other officers engaged in that were related to the "Mad Laugher" telephone calls. He said that he had heard Midder tell the appellant about Officer Moore having received four calls and that the appellant just shook his head and walked away.

In his sworn statement, Williams gave his opinion that the appellant and Officer Stallings were participants in the "Mad Laugher" telephone calls. *See* Appeal File, Vol. I, Tab 4(4s). Williams clarified that it was "only a guess." Seyler asserted in his sworn statement that he began receiving "Mad Laugher" telephone calls on June 26, 1992. *See* Appeal File, Vol. I, Tab 8(4z). He said:

> The main one to call was Sgt Erickson as his N. Carolina accent can't be hidden and was very easy to recognize. Sgt Erickson called approximately 75 times into the command center while I was on duty he would watch me on camera and call while I was on post inspection. Then at times he would have some one relieve him and

> be where I was and mad laugher calls would still come in. [Punctuation as in original.]

Id. According to Seyler's statement, when the personnel, including the appellant, were rotated to other shifts, the calls on the swing shift "all but stopped."

Wimpey indicated in her statement that she began receiving "Mad Laugher" calls in her office after she began working on the second shift.[5] *See* Appeal File, Vol. I, Tab 8(4y). She described receiving calls under the following circumstances:

> Then when I would be at Post #8 about to enter the plant a few times the phone would ring and would be for me. The Officer at the Post would hand me the phone and the caller would laugh and hang up. I proceeded to the Command Center as I knew there was a camera at Post #8 and accused Sgt. Erickson of calling me. He stated that he did not call me. [Grammar and punctuation as in original.]

Id. Wimpey said that, after receiving a call one night in her office, she called the Command Center and the appellant answered. She said that she "laughed" at the appellant and then identified herself, explaining that she had done it because she thought the appellant had been calling her. She stated that the appellant again denied having called her. Wimpey asserted that the appellant approached her a few days later and asked her to call the

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[5] In a subsequent affidavit, Wimpey stated that she is employed as a contract employee by the BEP and has worked as a Safety Specialist since April 1991. *See* Appeal File, Vol. II, Tab 24. She also confirmed that the statement she made during the investigation is truthful.

Command Center and laugh at Seyler. She said that she refused and told him that she was busy.

On appeal, the appellant did not specifically deny that he had participated in, or that he had knowledge of, the "Mad Laugher" calls; rather, he suggested that any misconduct on his part should be excused because he suffers from alcoholism.[6] He acknowledged that he had provided the sworn statement, but claimed that it had been given under duress. *See* Appeal File, Vol. I, Tab 2. He said that Williamson and Jesse Robinson, a police inspector, had called a meeting of the uniform police personnel on October 26, 1992, and informed them that they were launching an official "Mad Laugher" investigation; that the parties involved in the telephone calls would be fired; and that the officers were expected to cooperate in the investigation or action could be taken against them.

The appellant said that he was called into an interview with Williamson on October 30, 1992, and that he cooperated and answered the questions asked of him. He stated that Williamson subsequently called him a "liar"; that his request for counsel was denied; and that when he asked several times to leave the interview, Williamson refused his requests. The appellant stated:

> I felt I had been restrained against my will, and my job threaten [sic], and I was put under duress to answer questions to save my job.

Id.

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[6] The appellant's claim that he is an alcoholic will be discussed more fully in connection with his affirmative defense of handicap discrimination.

The appellant said that he was subsequently allowed to go home; however, when he next reported for duty, he was placed on administrative leave.[7]

For the following reasons, I find that it is more likely true than not true that the appellant had knowledge of and participated in the "Mad Laugher" telephone calls and that his sworn statement denying any such involvement was false. Straight, Williams, Seyler, and Wimpey provided sworn statements expressing their belief that the appellant was a participant in the "Mad Laugher" telephone calls. Although Willliams said that he was just guessing. Straight, Seyler, and Wimpey provided logical explanations for their conclusions about the appellant's involvement. Moreover, Wimpey related a specific incident where the appellant solicited her participation in the calls. I find the statements from Straight and Wimpey to be particularly persuasive because they candidly admitted that they also had participated in the telephone calls. Although the appellant claimed, in the statement he gave Williamson, that Seyler was "out to get him," he offered no motive, and no such motive is apparent, for Straight or Wimpey to give false statements against him.

In his appeal, the appellant contended that because he was ordered by Williamson to provide the sworn statement and to answer her questions and he feared for his job, the statement could not be used against him. The Board, however, has held that an employee's failure to

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[7] The appellant complained of the duty assignments he received subsequent to his providing the sworn statement; however, those complaints are not relevant to the charged misconduct.

cooperate in an agency investigation after being notified that the answers will not be used in a criminal prosecution is an actionable and serious offense. *See Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990).

Attached to his appeal was a document, signed by the appellant, specifically stating that he had bee advised that his statements would not be used in a criminal prosecution against him. *See* Appeal File, Vol. I, Tab 2. The appellant, therefore, was obligated to cooperate in the investigation. He was free to refuse to answer questions and suffer the consequences of his actions, but once he chose to answer, the circumstances did not justify his failing to give truthful answers.

Based on my review of the evidence submitted by the agency and, in the absence of a specific denial by the appellant that the statement he provided the agency was false, I find that the agency has supported its first charge by preponderant evidence. The charge that the appellant made false statements in matters of official interest is sustained.

The appellant engaged in conduct unbecoming a supervisor.

The agency asserted that the appellant's solicitation of Wimpey to telephone the Command Center and direct "Mad Laugher" at Seyler was conduct unbecoming a supervisor. In the notice of proposed removal, Williamson stated:

> To solicit the participation of a BEP Contractor in making disruptive telephone calls to a BEP Police Officer at his duty post is inappropriate for any Bureau employee and is totally unacceptable on the part of a supervisor.

Appeal File, Vol. I, Tab 8(41). In support of the charge, the agency offered the sworn statement made by Wimpey and her subsequent affidavit affirming the truth of the statement.

For the reasons previously given, I find Wimpey's statement to be worthy of belief. The appellant has neither denied that he asked Wimpey to place a "Mad Laugher" call to Seyler while Seyler was on duty nor has he offered any reason why Wimpey would fabricate such an allegation against him. A supervisor is expected to conduct himself in a professional manner and, at a minimum, refrain from encouraging pranks which would impede the agency's mission. The appellant acknowledged in his sworn statement to the agency that he had been told that the calls had to stop. I, therefore, find that the appellant's solicitation of Wimpey to make a "Mad Laugher" telephone call to Seyler was conduct unbecoming a supervisor. Accordingly, the agency's second charge is sustained.

The appellant bears the burden of proof on his affirmative defense of handicap discrimination.

Notwithstanding my findings on the merits of the agency's charges, the agency's decision to remove the appellant cannot be sustained if the appellant shows that it was based on a prohibited personnel practice, such as discrimination based on a handicapping condition, as described in 5 U.S.C. § 2302(b)(1). *See* 5 U.S.C. § 7701(c)(2). The appellant alleged that he suffers from

the handicapping condition of alcoholism; that the agency was aware of his condition prior to his removal; and that the agency refused to accommodate his condition by giving him an opportunity to rehabilitate himself. The appellant bears the burden of proof on this affirmative defense. *See* 5 C.F.R. § 1201.56(c)(2) (1993).

The appellant has not established that the agency's action was based on his handicapping condition.

A Federal agency is required to make reasonable accommodation for the known physical or mental limitations of a "qualified individual with a handicap" unless the agency can show that the accommodation would pose a hardship on its operations. 29 C.F.R. § 1614.203(c) (1992).[8] To establish a prima facie case of discrimination on the basis of a handicapping condition, the appellant must (1) show that he is an individual with a handicap as defined at 29 C.F.R. § 1614.203 (1992)[9] and that the agency action appealed to the Board was based on his handicap; and (2) to the extent possible, articulate a "reasonable

[8] This provision corresponds to 29 C.F.R. § 1613.704 (1992). In October 1992, new regulations concerning discrimination went into effect. The regulations applicable to this appeal are found in 29 C.F.R. Part 1614 (1992).

[9] An "individual with handicap(s)" is defined as one who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1614.203(a)(1) (1992). "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203(a)(3) (1992).

accommodation" under which he believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *See Savage v. Department of the Navy*, 36 M.S.P.R. 148, 152 (1988); *Stalkfleet v. United States Postal Service*, 6 M.S.P.R. 637, 647-48 (1981). Once the appellant has established a prima facie case, the agency has the burden of showing that the action was based on a legitimate, nondiscriminatory reason. This burden can be met by showing that the appellant is not a qualified individual with a handicap[10] or that reasonable accommodation of the appellant's handicap would impose an undue hardship on the agency's operations. *See Savage*, 36 M.S.P.R. 148, 153 (1988); *Stalkfleet*, 5 M.S.P.R. 637, 647-48 (1981).

Throughout the processing of this case, the appellant has asserted that he is an alcoholic. In his appeal, he stated:

> From November 11 thru November 27th 1992 I was admitted to Charter Hospital in Grapevine Texas suffering from alcoholism over this entire incident. My job was threaten, [sic] my marriage on the rocks and my elderly mother in North Carolina suffered a heart attack recently. This situation pushed me over the edge and I seeked professional help at Charter Hospital. [Grammar and punctuation as in original.]

[10] A "qualified individual with a handicap" is a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others. *See* 29 C.F.R. § 1614.203(a)(6) (1992).

Appeal File, Vol. I, Tab 2. The appellant said that after he completed his hospital stay, he advised the EEO officer, Ike Liggins, of his alcoholism and provided Liggins with a letter from his doctor. He asserted that, despite the recommendation in the doctor's note that he be returned to "normal duty," the agency gave him undesirable assignments which he believed would force him to relapse. He stated that, because of the undesirable assignments, he has "lost vacation time, [was] disallowed overtime, night shift pay, and Sunday premium pay and holiday pay." *Id.* The appellant said that he suffered a relapse on December 28, 1992, which resulted in his being hospitalized again at Charter Hospital until January 6, 1993.

The appellant said that he put his supervisor on notice of his condition when he returned to work on January 7, 1993. He also indicated that, after he received the notice of proposed removal on February 10, 1993, he notified the deciding official that he suffers from alcoholism and asked for an extension of time to complete his treatment program and to secure evidence of his physical condition. He acknowledged that he initially was granted an extension; however, when he asked for a further extension until April 1, 1993, his request was denied and the decision to remove him was made. The appellant asserted that he had provided the agency with all of the medical information he had available and he had taken steps to secure additional information; however, he had not received the documentation.

The appellant submitted a statement dated November 25, 1992, from S. Richard Roskos, M.D., of the Charter Hospital, which states:

> Lester Erickson has been under my care since Nov 11, 1992 and is scheduled to leave November 27th. He is released to return to work at full capacity, as of Nov 30, 1992. It would help his emotional state to return to normal duty. [Punctuation as in original.]

Appeal File, Vol. I, Tab 2; Vol. II, Tab 15. The appellant provided a copy of an "Interdisciplinary Treatment Plan" dated November 13, 1992, from Charter Hospital which gives a "nursing diagnosis" of "disuse syndrome" as manifested by the appellant's "long history of alcohol abuse." *Id.* The treatment plan recounts what the appellant had revealed about his alcohol abuse. He also provided a copy of his discharge summary, which indicated that he was given a prescription for the medication, "Zoloft". Finally, the appellant submitted a statement dated January 6, 1993, from Gary Malone, M.D., of the Charter Hospital, which states:

> Lester Erickson was admitted to our hospital on December 28, 1992. He has been participating in our inpatient program since that time. He is being discharged today and may return to work tomorrow, Thursday, January 7, 1993.

Id.

The agency argued that the appellant failed to provide sufficient evidence for it to assess his claim that he was handicapped by alcoholism. *See* Appeal File, Vol. II, Tab 25. The agency noted that neither of the doctor's statements give a diagnosis of alcoholism and that the treatment plan reveals no basis, other than the appellant's self-assessment, to support his claim that he suffers from alcoholism. The agency also noted that the discharge

summary contains no diagnosis of the appellant's condition and that the drug, Zoloft, which is referenced in the summary, is an anti-depressant which normally is not prescribed in the treatment of alcoholism.

The agency stated that it had given the appellant ample opportunity prior to his removal to provide evidence of his medical condition. The agency cited the letter from the deciding official to the appellant requesting that specific questions concerning his condition be answered by his doctor. *See* Appeal File, Vol. I, Tab 8(4h). The agency indicated that the only response it received was the appellant's answers to the questions, not the doctor's, which stated that his receipt of the requested information was "pending." *See* Appeal File, Vol. I, Tab 8(4e).

The agency argued that, based on the appellant's conduct and work performance, it had no reason to believe that his claim of alcoholism was valid absent some medical evidence. The agency noted that the appellant's work performance had been satisfactory or above and that his attendance had also been satisfactory. The agency submitted affidavits from Williamson, Stout, Wimpey, and Liggins, indicating that they had not observed any signs that the appellant had been under the influence of alcohol while he was at work. *See* Appeal File, Vol. II, Tab 23.

The agency also submitted an affidavit from John J. Griffith, a BEP Security Specialist. *Id.* Griffith stated that he and the appellant had been close friends since their days in Vietnam; that the appellant lived with him from December 1990 until August 1992; that he had observed

the appellant drink a few beers on about five occasions; and that he had seen him intoxicated only twice. Griffith said that he was surprised by the appellant's assertion that he is an alcoholic and asserted that, because of their close relationship, he would have known if the appellant had an alcohol abuse problem.

In *McCaffrey v. United States Postal Service*, 36 M.S.P.R. 224, 229 (1988), the Board held that in order for the appellant to establish that he suffers from the handicapping condition of substance abuse, he must provide evidence from himself concerning his pattern of substance abuse and its ill effects, and from medical or diagnostic experts that his pattern of substance abuse along with his other symptoms constitutes a handicapping condition. *See also Harris v. Department of the Army*, 57 M.S.P.R. 124, 128-29 (1993).

According to the treatment plan from Charter Hospital submitted by the appellant, he claimed that he had been drinking alcohol since he was 18 years old; that he had increased the frequency and amount of his alcohol intake to the point that he was drinking approximately 12 hours daily; and that he had tremors, blackouts, and nausea upon withdrawal. *See* Appeal File, Vol. II, Tab 15. In his appeal, the appellant repeatedly stated that he is an alcoholic, and that he has remained sober since December 29, 1992. The appellant, however, has not provided any expert medical evidence to confirm that he suffers from alcoholism. The doctor's statements do not contain a diagnosis; the treatment plan is based primarily on the appellant's representations; and the discharge summary, while referring to the appellant's need to remain sober, also does not contain a diagnosis of alcoholism.

Detracting from the appellant's claim of alcoholism are the affidavits of his co-workers, who asserted that they had never seen the appellant display any signs that he had been abusing alcohol. Griffith, who acknowledged a longstanding friendship with the appellant and with whom the appellant had lived for a significant period of time, said that he had not seen any evidence that the appellant regularly abused alcohol either at home or at work.

The record reflects that, prior to his removal, the appellant had requested additional medical evidence from Charter Hospital and his psychotherapist to establish that he suffers from alcohol abuse. *See* Appeal File, Vol. I, Tab 8(4e). The appellant, however, never provided the medical evidence to the agency nor has he provided it to the Board during the course of this appeal. Absent corroborating medical evidence and in light of the affidavits of the appellant's co-workers indicating that they had never observed anything to suggest that the appellant abused alcohol, I find that the record is insufficient to establish that the appellant is a handicapped person.

Assuming *arguendo* that the appellant had shown that he is a handicapped person, the evidence does not establish that the charged misconduct was a manifestation of the appellant's handicapping condition. The appellant has not claimed that he was under the influence of alcohol either when he provided the sworn statement to Williamson, concerning his knowledge and/or participation in the "Mad Laugher" calls, or when he asked Wimpey to make such a call to Seyler. According to

Willimason's description of her interview with the appellant on October 30, 1992, when he made the false statements, she observed nothing to indicate that the appellant was impaired. *See* Appeal File, Vol. II, Tab 23. Also, Wimpey said in her affidavit that she holds a bachelor's degree in Community Health, with a minor in Psychology; that she considers herself to be extremely observant; and that she had not perceived any signs of alcohol abuse by the appellant prior to his removal. I find that the appellant has failed to show that the agency action appealed to the Board was based on his handicap; therefore, this affirmative defense of handicap discrimination fails. *See Tate v. Department of Defense*, 57 M.S.P.R. 180, 189 (1993).

The penalty of removal is within the tolerable bounds of reasonableness and promotes the efficiency of the service.

An agency may take an action to remove an employee from his position only for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). The Board has held that an employee's failure to respond truthfully during an investigation into matters of official interest adversely affects the efficiency of the service. *See Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990); *Ford v. Department of Defense*, 30 M.S.P.R. 43, 44-45 (1986). Also, a supervisor's solicitation of another employee to engage in misconduct similarly impacts on the efficiency of the service.

Nevertheless, before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of

all relevant mitigating factors in the particular case. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303 (1981). The Board will review the agency-imposed penalty only to determine if the agency conscientiously considered all the relevant facts and exercised managerial discretion within tolerable limits of reasonableness. *Id.* at 306. In making such determinations, the Board gives due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's judgment, but to assure that managerial judgment has been properly exercised. *Id.*

Richard Laird, the deciding official, stated in his affidavit that prior to determining that removal was the appropriate penalty in this case, he investigated the appellant's claim that he had an alcohol problem and was unable to find any corroboration, either from the staff or the appellant's personnel records, for the appellant's claim. *See* Appeal File, Vol. II, Tab 23. He said that he considered the appellant's offenses to be extremely serious. He said that the appellant's "blatant dishonesty during an official investigation was totally unacceptable." He also stated that he felt the appellant's action set "an extremely poor example" for the employees that the appellant supervised. Laird said that, despite the appellant's good work record, he felt there was no reason to mitigate the proposed penalty of removal.

The appellant suggested that other employees who had been involved in the "Mad Laugher" calls had received nothing more serious than a two-week suspension for their misconduct and, therefore, the penalty of

removal in his case was too severe. *See* Appeal File, Tab 15. There is no evidence, however, that the employees identified by the appellant were supervisors, that they gave false statements to the agency, or that they solicited a contract employee to engage in misconduct. Consequently, any difference in the penalties assessed to these employees is not evidence that the appellant was disparately treated. *See Parker v. Department of the Navy*, 50 M.S.P.R. 343, 350 (1991).

The record reflects that the appellant had approximately two years and four months of service with the agency prior to his removal, and that his work performance and attendance was satisfactory. Nonetheless, the appellant's offenses are extremely serious and reflect poorly on his ability to responsibly perform the duties of a supervisor and law enforcement officer. *See Jones v. Department of the Army*, 52 M.S.P.R. 501, 506-507 (1992) (a security officer may be held to a high standard of conduct); *Jackson v. United States Postal Service*, 48 M.S.P.R. 472, 476 (1991) (the agency may hold a supervisor to a higher standard of conduct than non-supervisory employees). The record reflects that the deciding official conscientiously considered the relevant mitigating factors in this case. Based on my review of the record, I find that the penalty of removal does not exceed the tolerable bounds of reasonableness and, therefore, the agency's decision in this case must be accorded deference.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Sharon Fonsworth Jackson
Sharon Fonsworth Jackson
Administrative Judge